Filed 12/21/09 East West Bank v. Spiro CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

EAST WEST BANK, Plaintiff and Respondent, v. MARK F. SPIRO, Defendant and Appellant.	B210451 (Los Angeles County Super. Ct. No. GC040817)

APPEAL from an order of the Superior Court of Los Angeles County, Jan A. Pluim, Judge. Modified and affirmed.

Law Offices of Thomas B. McCullough, Jr., Thomas B. McCullough, Jr. and Lauriann Wright for Defendant and Appellant.

Buchalter Nemer, Scott O. Smith and Efrat M. Cogan for Plaintiff and Respondent.

Defendant and appellant Mark Spiro (Spiro) appeals a right to attach order issued in favor of plaintiff and respondent East West Bank (bank). Spiro's principal argument is that the order erroneously permits bank to attach certain real property in La Verne (Property). He contends that although he lives in the Property, the Property is owned by the Perry/Spiro 1995 Family Trust (Trust). Because bank did not establish that Spiro has an ownership interest in the Property, we modify the right to attach order to exclude any specific reference to it. As we shall explain, however, our opinion does not preclude bank from seeking to attach the Property pursuant to Code of Civil Procedure section 488.315.[1]

We also make a second modification to the right to attach order. Although bank claims that it is entitled to $75,845.65 in "miscellaneous fees and charges," there is no substantial evidence in the record to support that claim. We therefore reduce the amount bank may attach by $75,845.65, that is, from $1,662,597.12 to $1,586,751.47. As modified, the right to attach order is affirmed.

BACKGROUND

The genesis of this action is a failed real estate development project. Spiro helped form a limited liability company, El Caballero, LLC (El Caballero), for the purpose of purchasing land and developing a residential subdivision (Investment Property). El Caballero consisted of five members, including Fiatlux, LLC, a company owned by Spiro.

In order to finance its acquisition of the Investment Property, El Caballero borrowed $6,300,000 from bank, and executed a promissory note to bank for that amount. Spiro and others simultaneously executed guaranties of El Caballero's performance of the terms of the promissory note.

After El Caballero failed to make the payments due under the promissory note, bank declared El Caballero in default, and then commenced this action against Spiro and others by filing a complaint for breach of guaranty and money due. Shortly after filing its

---

1 Unless stated otherwise, section references are to the Code of Civil Procedure.

complaint, bank filed an application for a right to attach order. Bank alleged that as of February 28, 2008, Spiro and the other guarantors owed bank $6,081,118.70 in principal balance due under the promissory note, $212,501.31 accrued interest, $370,585.91 in late charges, and $75,845.65 in "miscellaneous fees and charges," for a total of $6,740,051.57.

Two days prior to filing its application for a right to attach order, bank conducted a non-judicial foreclosure sale of the Investment Property yielding net proceeds of $5,077,454.45. Bank did mention of the non-judicial foreclosure sale in its application papers.

In his opposition to the application, Spiro advised the court of the non-judicial foreclosure sale of the Investment Property and requested that the amount of the attachment be reduced by the amount of the proceeds from the sale. Spiro also argued that he did not "fully understand all of the consequences of signing the guaranty" and that the guaranty was unconscionable.[2]

In addition, Spiro stated that he was going to file a cross-complaint "against the appraiser [of the Investment Property] based on the appraiser's failure to honor their duties to the borrowers and guarantors." Spiro, however, did not elaborate on this statement and did not explain how the "appraiser's" breach of duty was a defense to bank's application for a right to attach order.

Spiro further argued that bank could not attach the Property. In his declaration, Spiro stated: "The real property located at 6873 Country Club Drive, La Verne, CA 91750 is owned by the Perry/Spiro 1995 Family Trust. This trust is not a named defendant in this action, nor did the Perry/Spiro 1995 Family Trust sign the Guaranty. I informed East West Bank of the fact that the home I live in is owned by the Perry/Spiro 1995 Family Trust when I filled out the loan application documents."

Spiro also attached to his declaration a balance sheet he claims he gave bank in connection with the guaranty he executed. The balance sheet purports to state Spiro's

---

[2] Spiro does not make this argument on appeal.

assets and liabilities as of September 30, 2005. Spiro listed his "Primary Residence" as an asset worth $800,000. In a footnote, Spiro stated: "Primary Residence Owned In Perry/Spiro 1995 Family Trust."

In support of its reply papers, bank filed a supplemental declaration of Steven Chang, a senior vice president of bank. Chang stated in his declaration that after the sale of the Investment Property, the balance due from the guarantors, including Spiro, for the principal, interest, late charges and miscellaneous fees and charges was $1,662,597.12. Chang also attached to his declaration copies of Spiro's 2006 federal tax return and Spiro's résumé. Bank argued that these documents showed that Spiro was a sophisticated real estate developer.

On the same day bank filed its reply papers, Spiro filed a cross-complaint against bank and others and an answer to bank's complaint. In his cross-complaint, Spiro alleged that bank's agents fraudulently induced El Caballero and its members to purchase the Investment Property by providing an appraisal that grossly overstated the market value of the Investment Property. Spiro also alleged in his answer that bank's causes of action are "barred" by bank's fraud.

After a hearing, the trial court issued a right to attach order. The order stated that bank had the right to attach Spiro's property in the amount of $1,662,597.12. It further stated that Spiro "shall transfer to the levying officer possession of" property described in an attached schedule. The schedule, in turn, listed eleven categories of property, including: "(1) Interest in real property, except leasehold estates with unexpired terms of less than on [*sic*] year, including but not limited to, the defendant's interest in that certain real property located within the County of Los Angeles, State of California, commonly known as 6873 Country Club Drive, La Verne, California 91750, Assessor's Parcel Number 8678-044-044. [CCP §488.315]" This appeal followed.

CONTENTIONS

Spiro's main argument is that bank cannot attach the Property. Spiro contends that the Property can only be attached if the Trust is revocable.[3] Because bank failed to prove that the Trust was revocable, there was allegedly no substantial evidence to support the right to attach order. Bank contends that Spiro had the burden of proving that the Property was "exempt" from attachment.

Spiro also argues that the trial court erroneously allowed bank to present evidence in its reply papers. Specifically, Spiro objects to statements made in Steven Chang's supplemental declaration regarding the amount of the attachment being sought, as well as documents attached to Chang's supplemental declaration regarding Spiro's experience as a land developer.

Spiro further argues the trial court erroneously issued the right to attach order because bank's claim against Spiro was not for a fixed or readily ascertainable sum. In particular, bank allegedly failed to describe precisely how it calculated the $75,845.65 in miscellaneous fees and costs it claimed.

Finally, Spiro argues that the right to attach order should not have been issued because bank did not establish the probable validity of its claims against Spiro. Spiro contends that bank's claims fail because bank's alleged fraud vitiated the promissory note and Spiro's guaranty. We shall address each argument in turn.

DISCUSSION

1. *Standard of Review*

Where, as here, an application for a right to attach order is decided based on affidavits or declarations, we apply a substantial evidence standard of review to the trial court's factual findings. (*Bank of America v. Salinas Nissan, Inc.* (1989) 207 Cal.App.3d 260, 273 (*Bank of America*).) "[W]e review the trial court's rulings regarding the

---

[3] Spiro did not state in a straightforward manner in his briefs to the trial court or this court whether the Trust is revocable or irrevocable. He also failed to file a copy of the document creating the Trust. Spiro's less than candid discussion of this issue is not helpful to the court and does not promote judicial economy or the interests of justice.

admissibility of evidence under the deferential abuse of discretion standard." (*Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 986.)

Even assuming we find that the trial court erred, we cannot reverse the judgment unless it appears " 'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.] This means the appellant must show not only that error occurred but that it is likely to have affected the outcome." (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 557.)

2. *The Requirements for a Right to Attach Order*

A trial court must grant an application for a right to attach order if it finds all of the following: (1) the claim upon which the attachment is based is one upon which an attachment may be issued; (2) the plaintiff has established the probable validity of the claim upon which the attachment is based; (3) the attachment is not sought for a purpose other than the recovery upon the claim upon which the attachment is based; and (4) the amount to be secured by the attachment is greater than zero. (§ 484.090, subd. (a).) Spiro disputes that requirements (1) and (2) are satisfied but does not dispute that requirements (3) and (4) are satisfied. We shall discuss requirement (1) in section 5, *post*, and requirement (2) in section 6, *post*.

3. *The Right to Attach Order Need and Should Not Make a Specific Reference to the Property*

Spiro contends that even if bank established all four requirements for a right to attach order, it cannot attach the Property because the Property is owned by the Trust. Spiro concedes, as he must, that whether a trust asset can be reached by a creditor depends on the status of the trust. "Property transferred to, or held in, a revocable inter vivos trust is . . . deemed the property of the settlor and is reachable by the creditors of the settlor. (See Prob. Code, §§ 18200, 18201.)" (*Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 633; accord *Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 337.)

Spiro contends that because bank did not establish that the Trust is irrevocable, it did not establish that the Property is subject to the right to attach order.[4] However, as we shall explain, in order to affirm the right to attach order we need not and should not decide whether the Trust is revocable or whether the Property can be attached.

Section 484.020 provides that an application for a right to attach order shall provide, inter alia, "(e) [a] description of the property to be attached under the writ of attachment and a statement that the plaintiff is informed and believes that such property is subject to attachment." The statute further provides: "Where the defendant is a natural person, the description of the property shall be reasonably adequate to permit the defendant to identify the specific property sought to be attached." (§ 484.020, subd. (e).)

In *Bank of America*, the plaintiff described the property to be attached in its application for a right to attach order in very general terms. The plaintiff sought to attach the defendants' "real property, personal property, equipment, motor vehicles," etcetera. (*Bank of America, supra*, 207 Cal.App.3d at p. 264.) The issue was whether the plaintiff's description of the property to be attached was sufficiently specific to satisfy the requirements of section 484.020, subdivision (e).

The court held: "The requirement of specificity appears designed to avoid unnecessary hearings where an individual defendant is willing to concede that certain

---

[4] Bank contends that it is Spiro's burden to prove that the Property is not "exempt" from attachment. (See § 487.020.) This misconstrues Spiro's argument. Spiro is not arguing that he owns the Property and that it is exempt from attachment. Rather, Spiro is arguing that the Property is owned by the Trust. Only property "of the defendant" is subject to attachment (§ 487.010) and can be claimed by the defendant as exempt.

Bank further argues that the Trust must be presumed revocable pursuant to Probate Code section 15400, which states in part: "Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settler." This section, however, by its terms "applies only where the settler is domiciled in this state when the trust is created, where the trust instrument is executed in this state, or where the trust instrument provides that the law of this state governs the trust." (Prob. Code, § 15400.) We cannot determine whether this section applies because the trust instrument is not in the record. Indeed, we do not even know whether Spiro is a settlor, trustee or beneficiary of the Trust.

described property is subject to attachment. We do not understand it to prohibit a plaintiff from targeting for attachment everything an individual defendant owns. . . . [¶] We conclude plaintiff's application here, though all-inclusive, was reasonably adequate to inform guarantors [defendants] what property was targeted for attachment." (*Bank of America, supra*, 207 Cal.App.3d at p. 268.)

Turning to the right to attach order here, the description of Spiro's "[i]nterest in real property, except leasehold estates with unexpired terms of less than [one] year" satisfied the requirements of section 484.020, subdivision (e). The language that followed that general description, which specifically referred to the Property, was superfluous under *Bank of America*.

We nonetheless hold that the specific reference to the Property should be removed from the right to attach order. There is no evidence in the record that Spiro owns the Property and there is uncontested evidence that the Property is owned by the Trust. The Property therefore cannot be attached unless Spiro is the settlor of the Trust and the Trust is revocable. (See Prob. Code, § 18200.) Because we cannot ascertain the nature of the Trust, we cannot and should not adjudicate the issue of whether the Property is subject to attachment.

Nothing in this opinion or the right to attach order, as modified by the opinion, prevents bank from seeking to attach the Property. In order to attach the Property, bank must, inter alia, obtain a writ of attachment and deliver the writ to a levying officer along with instructions.[5] (See §§ 484.520, 485.540, 488.020.) The levying officer will then record with the county recorder a copy of the writ of attachment and a notice of attachment. (§§ 488.315, 700.015, subd. (a).) If bank concludes that the Property is attachable, it may seek to attach the Property in that manner. We need not and do not decide at this time whether such an attachment would be effective.

---

[5] Spiro claims that the trial court issued a writ of attachment relating to him but failed to include in the record a copy of such a writ. As the appellant, it was Spiro's obligation to prepare a complete record; "if it is not in the record, it did not happen[.]" (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.)

4. *The Admission of Evidence Supporting Bank's Reply Papers Is Not Ground for Reversal*

Spiro contends that the right to attach order should be reversed because the trial court erroneously admitted evidence filed by bank with its reply papers. This evidence consisted of Spiro's tax return and résumé and statements in Chang's supplemental declaration regarding the proceeds of the non-judicial foreclosure sale.

A judgment or order cannot be reversed by reason of the erroneous admission of evidence unless (1) an objection to the evidence was timely made and (2) the admission of the evidence resulted in a miscarriage of justice. (See Evid. Code, § 353.) Here, there is nothing in the record indicating that Spiro made a timely objection to the evidence at issue. Spiro thus forfeited any objection to that evidence on appeal.

Further, Spiro did not present any argument with respect to whether the trial court's admission evidence resulted in a miscarriage of justice. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

Even if Spiro did not waive the miscarriage of justice issue, we would rule against him on it. Spiro's tax return and résumé were admitted for the purpose of showing that Spiro was a sophisticated real estate developer. Bank contended that this evidence undermined Spiro's argument that the guaranty was unconscionable. Spiro, however, did not argue on appeal that the guaranty was unconscionable, and therefore forfeited the issue. Accordingly, Spiro's tax return and résumé are irrelevant to the issues on appeal and the admission of these documents in no way caused a miscarriage of justice.

Likewise, Chang's statements regarding the proceeds of the non-judicial foreclosure sale of the Investment Property was evidence the trial court used to *reduce* the amount of the right to attach order by $5,077,454.45. This was beneficial to Spiro, not prejudicial. Hence, the trial court's admission of Chang's statements regarding the sale of the Investment Property did not result in a miscarriage of justice.

5. *Bank's Claim was for a Fixed or Readily Ascertainable Amount, But There Was No Substantial Evidence to Support the Portion of Bank's Claim Relating to Miscellaneous Fees and Charges*

"Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, *where the total amount of the claim or claims is a fixed or readily ascertainable* amount not less than five hundred dollars ($500) exclusive of costs, interest, and attorney's fees." (§ 483.010, subd. (a), italics added.) An application for a right to attach order must be supported by an affidavit (§ 484.030) which states facts with particularity. (§ 482.040.)

Here, bank's claim consisted of a principal balance, accrued interest, late charges, and miscellaneous fees and charges. Spiro does not dispute that each of the first three items were fixed or readily ascertainable; but he contends that the fourth item, miscellaneous fees and charges, was not.

Bank contends that the miscellaneous fees and charges consisted of an estimate of costs and allowable attorney's fees associated with its application for a right to attach order. Such costs and fees are recoverable (§ 482.110, subd. (a)) and readily ascertainable. For example, bank could have submitted a declaration by its attorney stating the fees and enforcement costs already incurred and estimating the fees and costs that would be incurred to attach Spiro's property. Bank, however, did not do that. Indeed, bank provided no admissible evidence explaining what the $75,845.65 of miscellaneous fees and charges consisted or how such fees and charges were calculated.[6]

Bank contends that it is entitled to recover attorney's fees pursuant to the Superior Court of Los Angeles County, Local Rules, rule 3.2. This rule, however, only applies to

---

[6] In Steven Chang's declaration dated May 28, 2008, he stated that the guaranties signed by Spiro and others included an attorney's fees and expenses provision, and that bank engaged the services of a law firm to bring this action. Chang did not, however, state that miscellaneous fees and charges consisted of attorney's fees and expenses.

a judgment, and not to a right to attach order.[7] Thus there is no substantial evidence supporting bank's claim for miscellaneous fees and charges in the amount of $75,845.65.

6. *Spiro Did Not Meet His Burden of Establishing His Fraud Claim or His Fraud Defense*

"Attachment is a prejudgment remedy which requires a court to make a preliminary determination of the merits of a dispute." (*Lorber Industries v. Turbulence, Inc.* (1985) 175 Cal.App.3d 532, 535 (*Lorber*). The trial court cannot grant a right to attach order unless the plaintiff establishes the probable validity of the claim upon which the attachment is based. (§ 484.090, subd. (a)(2).)

Spiro argues that bank will not prevail on its claims against him because he will prevail on his fraud cause of action against bank and fraud defense against bank's claims. The burden of proof with respect to both his claim for relief and defense is on Spiro. (Evid. Code, § 500.)

In support of his fraud claim and defense, Spiro relies almost completely on his own unverified cross-complaint. Spiro, however, cannot rely on his own unverified pleading as "evidence" to oppose bank's application for a right to attach order. (*Lorber, supra*, 175 Cal.App.3d at p. 536 [cross-complaint did not constitute evidence in opposition to application for right to attach order]; § 484.060, subd. (a) [opposition to application "shall be accompanied by an affidavit supporting any factual issues raised . . . ."]; § 482.040 ["A verified complaint . . . may be used in lieu of or in addition to an affidavit"].) Spiro therefore did not meet his burden of establishing his fraud cause of action or fraud defense.

---

[7] Even assuming the rule applied to a right to attach order, bank would not be entitled to recover $75,845.65 in attorney's fees. The rule provides that in a "contested" case (as opposed to a "default" case) involving over $100,000, attorney's fees are $5,270 plus 2% of the excess of $100,000. (Super. Ct. L.A. County, Local Rules, rule 3.2(a).) In this case, that amount would be $36,526.94.

DISPOSITION

The right to attach order is modified in two ways. First, paragraph 1 of the schedule on the last page of the right to attach order is deleted and replaced with the following: "(1) Interest in real property, except leasehold estates with unexpired terms of less than one year [CCP § 488.315]." Second, paragraph 3 on page 2 of the right to attach order is modified by changing the amount of $1,662,597.12 to $1,586,751.47. As modified, the right to attach order is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.